

## **2 FAM 1180**

### **RULEMAKING PROGRAM**

*(CT:GEN-424; 09-02-2014)  
(Office of Origin: A/GIS/DIR)*

## **2 FAM 1181 POLICY AND OBJECTIVES**

### **2 FAM 1181.1 Policy**

*(CT:GEN-424; 09-02-2014)*

- a. It is Department of State policy that all Department rulemaking actions are processed and issued in a consistent manner and in accordance with all applicable standards, requirements and legal provisions.
- b. The Department is committed to promulgating rules that are narrowly tailored to impose the least burden on the U.S. public necessary to achieve Department objectives. Therefore, it is Department policy to prioritize initiatives that will produce significant quantifiable reductions in public burden, or produce significant quantifiable monetary savings. Offices must take continuing steps to reassess regulatory requirements and, where appropriate, to streamline, improve, or eliminate those requirements that may be outmoded, ineffective, insufficient or excessively burdensome.
- c. The Department is further committed to advancing the three principles of open government--transparency, participation, and collaboration. Documents constructed under this section must conform to these principles:
  - (1) Transparency** promotes accountability by providing the public with information about what the Government is doing.
  - (2) Participation** allows members of the public to contribute ideas and expertise so that their Government can make policies with the benefit of information that is widely dispersed in society. Regulations must be based, to the extent feasible and consistent with law, on the open exchange of such information and perspectives among state, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.
  - (3) Collaboration** improves the effectiveness of Government by encouraging partnerships and cooperation within the Federal Government, across levels of government and between the Government and private institutions.

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## **2 FAM 1181.2 Objectives**

(CT:GEN-424; 09-02-2014)

- a. The purpose of the Department's Rulemaking program is to comply with the Administrative Procedure Act (APA), pertinent Executive Orders and all Office of Management and Budget (OMB) requirements in the most efficient, effective and accurate manner.
- b. The Department achieves its purpose through meeting the following program objectives:
  - (1) Provide central program administration via the Office of Directives Management (A/GIS/DIR) with legal guidance from the management section of the Office of the Legal Adviser (L/M);
  - (2) Provide expert interpretation of the APA, Executive Orders, OMB requirements, and Federal Register (FR) requirements (including any changes to such) to the Department's bureaus and offices;
  - (3) Provide on-going training and guidance to Department staff who prepare and clear on rules and FR rule notices;
  - (4) Maintain efficient and effective administrative processes that, if followed, result in OMB and FR approvals;
  - (5) Manage the Department's retroactive rule reviews to evaluate and eliminate rules that present undue burdens on the public, and which will result in cost savings to the Federal Government; and
  - (6) Archive all rules and supporting records according to National Archives retention schedules.

## **2 FAM 1181.3 Scope**

(CT:GEN-424; 09-02-2014)

The Rulemaking program applies to the Department of State and its operations worldwide.

## **2 FAM 1181.4 Applicability**

(CT:GEN-424; 09-02-2014)

This program is to be used for all Department of State rules and accompanying FR rule notices.

## **2 FAM 1182 AUTHORITIES**

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(CT:GEN-424; 09-02-2014)

Department rulemaking is executed under the applicable laws of the United States, principally those contained in:

- (1) Federal Register Act (44 U.S.C. Chapter 15): the enabling statute for the National Archives and Records Administration (NARA), acting through the Office of the Federal Register, to receive and publish documents such as regulations and other notices in the Federal Register.
- (2) Administrative Procedure Act (5 U.S.C. Subchapter II): governs the way in which Federal agencies propose and establish regulations. The APA also sets up a process for Federal courts to directly review agency decisions.
- (3) Federal Advisory Committee Act (5 U.S.C. Appendix): governs the actions of Federal advisory committees. In particular, it has special emphasis on open meetings, chartering, public involvement and reporting. The U.S. General Services Administration oversees the process.
- (4) Freedom of Information Act (5 U.S.C. 552): allows for the full or partial disclosure of previously unreleased information and documents controlled by the U.S. Government.
- (5) Plain Writing Act of 2010 (5 U.S.C. 301 note): has a stated purpose of improving effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.
- (6) Privacy Act (5 U.S.C. 552a): governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies.
- (7) Government in the Sunshine Act (5 U.S.C. 552b(c)): lists the situations in which a federal advisory committee may close its meeting, if authorized by the appropriate official.
- (8) Negotiated Rulemaking Act (5 U.S.C. 561 et seq.): establishes a framework for the conduct of negotiated rulemaking to encourage agencies to use the process when it enhances the informal rulemaking process.
- (9) Regulatory Flexibility Act (5 U.S.C. 601 et seq.): imposes both analytical and procedural requirements on Federal agencies. When this Act applies to a rulemaking, agencies must carefully consider the economic impacts its rules will have on small entities, and ensure that small entities have a voice in the regulatory development process.
- (10) Small Business Regulatory Enforcement Fairness Act and Congressional Review Act (5 U.S.C. 801 et seq.): mandates that Federal agencies establish a policy or program that reduces and waives civil penalties for violations of a statutory or regulatory requirement by a small entity, among other things. This set of statutes also provides for Congressional review of final rules and, in certain cases, modification of the effective date

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of rules.

- (11) Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.): designed to reduce the total amount of paperwork burden the federal government imposes on private businesses and citizens. The Act imposes procedural requirements on agencies that wish to collect information from the public. It also established the Office of Information and Regulatory Affairs within the Office of Management and Budget.
- (12) Executive Order 12866, as amended: establishes policies to reform and make more efficient the regulatory process. Its stated purpose is to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. The Executive Order defines significant rulemakings and setting out a process for interagency review of those rules.
- (13) Executive Order 13563: builds on Executive Order 12866 with to ensure that regulations are accessible, consistent, written in plain language, and easy to understand. One main feature of the order mandates the periodic and ongoing retrospective analysis of existing rules, with a purpose of eliminating rules that are outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.
- (14) Executive Order 13132: prohibits agencies from issuing a regulation that has federalism implications; that imposes substantial direct compliance costs; and that is not required by statute, unless the Federal Government takes certain actions. The Department may not issue a regulation that has federalism implications and that preempts State law, unless the Department consults with state and local officials early in the process of developing the proposed regulation.
- (15) Executive Order 13175: requires agencies to reconsider federal policies that have tribal implications, to strengthen U.S. government-to-government relationships with Indian tribes, and avoid or reduce any unfunded mandates upon Indian tribes.

## **2 FAM 1183 ADMINISTRATIVE PROCEDURE ACT (APA)**

*(CT:GEN-424; 09-02-2014)*

- a. The APA governs the process by which Federal agencies propose and establish new regulations. The APA generally requires agencies to provide public notice and seek comment prior to enacting new regulations. The APA also lays out the

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process for judicial review of rules in federal court.

b. The purposes of the APA are to:

- (1) Require agencies to keep the public informed of their organization, procedures and rules;
  - (2) Provide for public participation in the rulemaking process;
  - (3) Establish uniform standards for the conduct of formal rulemaking and adjudication; and
  - (4) Define the scope of judicial review.
- c. The Act imposes a number of procedural requirements on an agency that wishes to enact regulations. These procedures can be found at the Rulemaking page of the Office of Directives Management website.

## **2 FAM 1184 KEY DEFINITIONS**

*(CT:GEN-424; 09-02-2014)*

**Advance Notice of Proposed Rulemaking (ANPRM):** A notice published in the Federal Register that provides public notice of a proposed rulemaking, and solicits comments from the public for a period of usually 60 days. An ANPRM generally does not provide the actual text of a planned rule but explains what the rule is intended to do and why. Its purpose is to solicit public input on various issues relating to the intent of and reason for the rulemaking.

**Direct Final Rule:** A direct final rule is not preceded by a proposed rule. It may be used for routine and noncontroversial regulations that the Department believes will not generate adverse comment. A direct final rule becomes effective on the date specified in the rulemaking, unless adverse comment is received on the rule within a specified comment period before that date.

**eRulemaking Program:** a collaborative, inter-agency effort, with an aim to establish a common, automated, and integrated repository for managing Federal rulemaking and non-rulemaking actions that follow a structured notice and comment process.

**Federal Docket Management System (FDMS):** The federal government's agency-facing system, which consolidates dockets of various departments and agencies and allows for central management through a web-based environment.

**Final rule:** A final rule is the formal, permanent issuance of a rule. Usually preceded by an interim or proposed rule, a final rule does not solicit comments from the public, but contains the appropriate regulatory analyses (or incorporates by reference the analyses in a previous interim or proposed rule).

**Interim rule:** An interim rule carries the force of law upon its effective date, but is temporary in nature, pending the issuance of a final rule or its withdrawal.

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An interim rule solicits comments from the public for a period of, usually, 60 days.

**Proposed rule:** Proposed rules have no force of law; they simply inform the public of the Department's policy considerations, and solicit comments usually for a period of 60 days.

**Regulation Identifier Number (RIN):** Obtained by the Office of the Legal Adviser, General Management (L/M), for program offices. This is a tracking number for planned Code of Federal Regulations (CFR) changes.

**Regulations.gov:** The federal government's public-facing website for participating agencies. The public may view the full text of rulemaking actions, submit comments, and view the comments of others.

**Regulatory findings (also regulatory analysis and notices):** The part of a rule notice that addresses the issuing agency's acknowledgement that the following authorities have been considered (this list is not exhaustive):

- Administrative Procedure Act
- Regulatory Flexibility Act
- Unfunded Mandates Reform Act of 1995 (UMRA)
- Small Business Regulatory Enforcement Fairness Act of 1996 and Congressional Review Act
- Executive Order 12866
- Executive Order 13132
- Executive Order 12988, Civil Justice Reform
- Executive Order 13175
- Paperwork Reduction Act

**ROCIS (Regulatory Information Service Center (RISC) and Office of Information and Regulatory Affairs (OIRA) Combined Information System):** Managed by the General Services Administration (GSA) and NARA, this is the basic database for OMB rule reviews. All Executive Order (EO) review submissions are done through this system by uploading the rule notice and any relevant documents.

**Retrospective Analyses of Existing Rules:** The continuing requirement to review existing significant regulations and consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. OMB requires a semiannual report, which details the status of the Department's review efforts.

**Rule:** An agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.

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**Significant regulatory action:** These are defined in Executive Order 12866 as those that have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients; or raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in Executive Order 12866.

**Unified Regulatory Agenda (Unified Agenda):** The Agenda provides information, in a uniform format, about regulations that the U.S. Government is considering or reviewing. The Agenda includes regulatory agendas from most Federal agencies, excluding agencies of the U.S. Congress.

## **2 FAM 1185 PROGRAM RESPONSIBILITIES**

### **2 FAM 1185.1 Under Secretary for Management (M)**

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Pursuant to Delegation of Authority 198, dated September 16, 1992, by which the Secretary of State delegated management-related functions to M, the Under Secretary for Management is the Department of State Regulatory Policy Officer (RPO). This position is mandated by Section 6 of Executive Order 12866, as amended. In addition to the RPO duties outlined in the Executive Order, M approves and submits the Department's semi-annual submission to the Unified Agenda of Regulatory and Deregulatory Actions, which is required by Section 4 of the Executive Order.

### **2 FAM 1185.2 Chief Information Officer (CIO)**

(CT:GEN-424; 09-02-2014)

The CIO is the official executive representative of the Department in the inter-agency eRulemaking program. The CIO budgets the funds that support the Department's participation in the Regulations.gov website. The CIO signs the annual eRulemaking Memorandum of Understanding on behalf of the Department.

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## **2 FAM 1185.3 Assistant Secretary for Administration (A)**

*(CT:GEN-424; 09-02-2014)*

The Assistant Secretary for Administration provides senior leadership for the Rulemaking program.

## **2 FAM 1185.4 Office of Directives Management (A/GIS/DIR)**

*(CT:GEN-424; 09-02-2014)*

- a. The Office of Directives Management (A/GIS/DIR) manages the Rulemaking program for the Department under the authority of the Assistant Secretary for Administration and with the legal assistance of L/M.
- b. A/GIS/DIR:
  - (1) Works collaboratively with bureaus and offices that write, change, or repeal Department rules. Provides guidance throughout the process to ensure the Department is in compliance with the APA, OMB and FR requirements;
  - (2) Reviews and approves all FR notices and rule dockets prior to their submission. Ensures notices and rule dockets are complete and accurate;
  - (3) Inputs all required data into the Federal Docket Management System (FDMS) and into ROCIS;
  - (4) Facilitates discussions between Department bureaus/ offices and the Federal Register and/or OMB concerning issues on FR notices and rules;
  - (5) Reads and interprets all legal and regulatory mandates; changes Department guidance as needed. Creates and maintains efficient and effective administrative practices and processes for rulemaking based on the current OMB requirements;
  - (6) Provides training to Department staff on FR notices and rulemaking;
  - (7) Develops rulemaking reports and statistics for OMB as required. Works with bureaus and office to find and compile data for one combined report from the Department;
  - (8) Maintains the Department's archive and historical records of all rules (past and present); submits records to NARA according to Records Disposition Schedules;
  - (9) Obtains feedback on other agency rules from bureaus and offices who are stakeholders and provides that consolidated feedback to OMB;
  - (10) Serves as a single point of contact for OMB and the Federal Register on the Department's rules;

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- (11) Provides daily courier service to the Federal Register, and
- (12) Represents the Department on both the Executive Committee and Advisory Committee of the eRulemaking Board.

## **2 FAM 1185.5 Bureaus/Offices Originating Rules**

*(CT:GEN-424; 09-02-2014)*

Department bureaus and offices seeking to write, amend, or terminate a rule are responsible for:

- (1) Consulting with A/GIS/DIR throughout the effort;
- (2) Following Department procedures and requirements for rulemaking as described on the Office of Directives Management website;
- (3) Obtaining necessary clearances according to the Department's procedures and any internal clearances as required by the head of the Bureau; and
- (4) Responding with pertinent data when OMB has a reporting requirement and/or issues a data call.

## **2 FAM 1185.6 Office of the Legal Adviser (L)**

*(CT:GEN-424; 09-02-2014)*

The Office of the Legal Adviser reviews rules as appropriate for content and legal sufficiency and provides legal guidance and direction to program offices as needed. The Office of General Management (L/M) compiles and submits the Unified Regulatory Agenda and obtains RINs for Department rules.

## **2 FAM 1186 TYPES OF RULES**

*(CT:GEN-424; 09-02-2014)*

The program office determines the type of rulemaking action, depending on its purposes. Some types are:

- Advance notice of proposed rulemaking
- Proposed rule
- Final rule
- Final rule; delay of effective date
- Final rule; suspension of effectiveness
- Final rule; confirmation of effective date
- Final rule; correction
- Final rule; interpretation

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- Final rule; petition for reconsideration
- Interim rule
- Interim rule with request for comments
- Direct final rule
- Temporary rule

The majority of Department rule types are proposed, interim, final, and direct final.

## **2 FAM 1187 RULES PROPOSED BY OTHER FEDERAL AGENCIES**

*(CT:GEN-424; 09-02-2014)*

The Office of Management and Budget sends significant rules drafted by other Federal agencies to the regulatory coordinator in A/GIS/DIR, who tasks bureaus and offices with reviewing and providing comments and/or clearance on the drafts. As needed, the coordinator compiles the Department response on behalf of the commenting offices and does such follow-up liaison and discussion as needed. Conversely, Department of State rules that OMB designates as significant are reviewed by other interested agencies within the Federal Government.

## **2 FAM 1188 THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA)**

*(CT:GEN-424; 09-02-2014)*

- a. Throughout this subchapter, the Office of Management and Budget (OMB) is used generically without specifying any one of its offices. However, OIRA is really the OMB office with responsibility specifically for rulemaking.
- b. In addition to reviewing government collections of information from the public under the Paperwork Reduction Act, OIRA reviews draft proposed and final regulations under Executive Order 12866 and develops and oversees the implementation of government-wide policies in the areas of information policy, privacy and statistical policy.
- c. Executive Order 12866 assigned OIRA the responsibility of coordinating the review of significant regulations before publication. This is to ensure agency compliance with the principles in the Executive Order, which include incorporating public comment, considering alternatives to the rulemaking, and analyzing both costs and benefits.
- d. The State Department has an assigned desk officer in OIRA and that individual works closely with the Office of Directives Management and L/M on the Unified

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Agenda and rulemaking efforts.

**2 FAM 1189 UNASSIGNED**